

LOS ANGELES BAR BULLETIN



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In This Issue

Hearing Officers Needed	<i>H. J. McC.</i>	97
Random Comment	<i>E. D. M.</i>	99
Procedure for Exercising Peremptory Challenges in Selecting Juries in Federal Court	<i>James M. Carter</i>	100
Some Observations on the Settlement of Terminated Cost-Plus-a-Fixed-Fee War Contract	<i>Phil H. Curry</i>	112
Retrospect on Cost-Plus	<i>Norman Macbeth</i>	125

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HEARING OFFICERS NEEDED

THE California Administrative Procedure Act became effective September 15, 1945. This act amends the Government Code and prescribes the procedure for the exercise of administrative process in California. The State Bar of California takes pardonable pride in the passage of this measure since it has worked for the enactment of a regulatory statute for the last several years.*

The new law provides for the hearing of contested cases before affected agencies by hearing officers. The State Bar

*The following quotation is taken from a letter written to the editor by Mr. Ralph N. Kleps, Chief of the Division of Administrative Procedure of the Department of Professional and Vocational Standards: "I suggest that you might emphasize the fact that the members of the Los Angeles Bar, under the inspiration of Mr. Harry J. McClean, were largely instrumental in securing the enactment of this legislation and that the successful operation of the hearing officer system in Los Angeles depends upon the readiness with which qualified men come forward to apply for these new positions."
—Ed.

has urged the adoption of the hearing officer principle for the regulation of administrative agencies since its early studies of the administrative law problem in California. The Administrative Procedure Act, being now effective and providing for hearings before hearing officers, the selection and appointment of qualified hearing officers becomes a very important matter.

Mr. Percy C. Heckendorf, Director of the Department of Professional and Vocational Standards, advises that the State Personnel Board is preparing examinations for the purpose of certifying a list of eligibles, from which list hearing officers will be appointed. It is of utmost importance that qualified persons be selected for such positions. The work of hearing officers is essentially judicial in character. Those appointed to the position should possess the qualifications which should characterize all who hold judicial office. It has been announced that the minimum entering salary of \$435 per month, including \$20 per month war time emergency increase, has been established for the position of Hearing Officer Grade I. An entering salary of \$495 per month, including \$20 per month war time emergency increase, has been established for the position of Hearing Officer Grade II. An entering salary of \$595 per month, including \$20 per month war time emergency increase, has been established for the position of Chief of the Division of Administrative Procedure.

The State Bar is very much interested in the certification of an adequate number of competent hearing officers and urges lawyers who feel that they possess requisite qualifications and who look toward public service as a career to give serious consideration to this call for examination by the State Personnel Board. It is a great opportunity for public service as well as for qualified persons to secure a permanent position of trust and responsibility. Those interested should communicate at once with Mr. Percy C. Heckendorf, Director of the Department of Professional and Vocational Standards, 516 Business and Professions Building, 1020 N Street, Sacramento 14, California. The examination is tentatively scheduled for December 29, 1945.—H. J. McC.

RANDOM COMMENT

Divorces: The divorce "problem" has stirred bar and bench in some other states to take notice of the "appalling" increase in divorce suits. Michigan State Bar's Committee on Legal Aid believes a great "moral responsibility rests upon lawyers to help turn back the tide of divorces." In Texas some judges "deplore" the situation and suggest a domestic relations council. Los Angeles County, someone has said, leads the country in the number of divorce suits filed six days a week, the year 'round, in a single county. No one here seems to think or do anything about it. Maybe we don't recognize a "moral responsibility" in such matters. Anyone attempting to "turn back the tide" would be trampled by high-heel shoes.

How We Change! New York State Bar Association has hired a high powered newspaperman as its press agent to maintain liaison between the state, county, and city organization, conduct membership campaigns and supervise publications. Our great State Bar has employed public relations counsel for several years, but contact with local associations is not noticeable. But maybe we just don't know what we are talking about. Could be.

* * *

Stopping the Clock: When a legislative body uses the old trick of stopping the clock to prevent the expiration of the legal session it is "flouting the constitution," says Connecticut Bar President Blodgett. It seems the legislature remained in session after the hour it was required to adjourn, and that after that hour it passed several bills, one of which provides for the admission of attorneys from other states. The Bar objected to that bill, because, it held, no legislature should transfer from the judiciary the establishment of requirements of admission to the Connecticut bar. So, it may be that the legality of the stop-the-clock device may be tested.

—E. D. M.

PROCEDURE FOR EXERCISING PEREMPTORY CHALLENGES IN SELECTING JURIES IN FEDERAL COURT

By James M. Carter,
Assistant to the United States Attorney, Los Angeles

SINCE the repeal of Rule 51¹ of "Rules of Practice of the U. S. District Court," there has been confusion as to the procedure in exercising peremptory challenges in selecting trial juries in the Federal Court. The scope of this memorandum concerns the power of the court to regulate that procedure.

The present rules of the District Court for the Southern District of California, effective January 15, 1944, provide no procedure for the exercise of peremptory challenges.² Nor do the proposed Rules of Criminal Procedure, not yet effective,³ provide any method or procedure.⁴

RULE 51.—JURIES, EMPANELING OF, TO TRY A CAUSE. Unless otherwise stipulated by the parties, in both civil and criminal cases, juries shall be empaneled as follows: The box shall be filled and examination on *voir dire* had and challenges for cause taken and determined. Peremptory challenges shall then be exercised by plaintiff and defendant alternately. The box shall be filled from time to time, in the discretion of the Court. After all peremptories have been taken, or the parties satisfied, the jury shall then be sworn as a body to try the cause. In felony cases the defendant shall exercise two challenges to the Government's one until the peremptories remaining are equal, then they shall alternate.

²Rule 13 refers to demand for jury trial in civil cases. Rule 14 refers to instructions. No reference is made in Chapter IV, "Rules of Criminal Procedure, Southern District of California," to juries or their selection.

RULE 59. EFFECTIVE DATE. These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending."

Since the first regular session of the 79th Congress did not adjourn prior to September 1, 1945, the criminal rules will take effect three months subsequent to adjournment. It is anticipated that Congress will adjourn approximately the end of 1945, and the rules will take effect three months thereafter.

⁴The proposed criminal rules provide in Rule 24(a) for the examination of trial jurors, and 24(b) for the use of peremptory challenges. However, the rule makes no provision for the method to be used in exercising peremptory challenges or the order in which the challenges shall be exercised.

Section 424, U. S. C. Title 28, provides for the number of peremptory challenges in civil and criminal cases.⁵ There is nothing in the statute or in Sections 411 to 426, U. S. C. Title 28, which provides for the procedure to be followed in exercising peremptory challenges.

With the exception of certain proceedings before Commissioners, which is not involved in this problem, and the further exception of the qualification of grand and petit jurors, which will be discussed later herein, the general rule is that Federal criminal procedure is not governed nor controlled by state laws, rules, or practice.

As to procedure, the Supreme Court has stated in *United States v. Murdock* (1931) 284 U. S. 141, 150, 52 Sup. Ct. 63, 76 L. Ed. 210, 82 A. L. R. 1376):

"Federal criminal procedure is governed not by state practice but by federal statutes and decisions of the federal courts. *United States v. Reid*, 12 How. 361. *Logan v. United States* 144 U. S. 263, 301. *Jones v. United States*, 162 Fed. 417, 419. *United States v. Nye*, 4 Fed. 888, 890."

As to evidence, the Supreme Court has also spoken directly on the subject.

In *Wolfe v. United States* (1933), 291 U. S. 7, 12; 78 L. Ed. 617; 54 Sup. Ct. 279, the Supreme Court stated:

"During the present term this Court has resolved conflicting views expressed in its earlier opinions by holding that the rules governing the competence of wit-

⁵Sec. 424. (JUDICIAL CODE, Section 287.) CHALLENGES. When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purpose of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers. (R.S. Sec. 819; Mar. 3, 1911, c. 231, Sec. 287, 36 Stat. 1166.)

nesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience. *Funk v. United States*, 290 U. S. 371. If any different rule with respect to the admissibility of testimony has been thought to apply in the federal courts, Wigmore on Evidence, 2d ed., Sec. 6; compare *Alford v. United States*, 282 U. S. 687, it is clear that it should be the same as that governing the competence of witnesses. So our decision here, in the absence of Congressional legislation on the subject, is to be controlled by common law principles, not by local statute."

In *McNabb v. United States* (1943), 318 U. S. 332, the Supreme Court stated at p. 341:

"The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone v. United States*, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions, *e.g.*, *Ex parte Bollman & Swartwout*, 4 Cranch 75, 130-31; *United States v. Palmer*, 3 Wheat. 610, 643-44; *United States v. Furlong*, 5 Wheat. 184, 199; *United States v. Gooding*, 12 Wheat. 460, 468-70; *United States v. Wood*, 14 Pet. 430; *United States v. Murphy*, 16 Pet. 203; *Funk v. United States*, 290 U. S. 371; *Woffe v. United States*, 291 U. S. 7; see 1 Wigmore on Evidence (3d ed. 1940) pp. 170-97; Note, 47 Harv. L. Rev. 853. And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

Prior to the Supreme Court decisions above cited, there had been conflicting decisions on the subject, and the Supreme Court arrived at its present position in a series of steps. For an excellent discussion and summation of the old authorities see *United States v. Montgomery* (3d Cir. 1942), 126 F. (2d) 151, at 154 and 155.

There exists in Title 28 several sections which, on their face, would seem to be in conflict with the decisions of the Supreme Court above cited. Section 725, U. S. C. Title 28⁶ refers to the laws of states as rules of decision in *trials at common law*, but the phrase "trials at common law" as used in this section has been repeatedly construed as limited to civil actions and not to criminal prosecutions.⁷

Section 729, U. S. C. Title 28⁸ has also been the source of some confusion. Justice Clifford, of the Supreme Court, in a dissenting opinion⁹ has aptly stated:

"Examined in the most favorable light, the provision is a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence, without any suggestion whatever as to what he shall do in such

⁶"Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. (R. S. Sec. 721.)"

⁷*United States v. Reid* (1851), 12 How. 361, 13 L. Ed. 1023. See also numerous cases cited in the annotations under Section 725, U. S. C. A., Title 28, Note 4, Criminal Cases.

⁸"Proceedings in Vindication of Civil Rights.

"The jurisdiction in civil and criminal matters conferred on the District Courts by the provisions of Chapter III of Title 8 and Title 18 for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the Court having jurisdiction of such civil or criminal case is held, so far as the same is not inconsistent with the Constitution and the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R. S., Sec. 722.)"

⁹*Tennessee v. Davis*, 100 U. S. 257, at 299. Suffice it to say that the section (729) gave the Supreme Court no concern in the *Wolfe*, *Murdock* and *McNabb* cases cited above.

an extraordinary emergency if he should meet a question not regulated by any one of the three systems.
* * *

In *Lung v. United States* (9th Cir., 1915), 218 Fed. 817, Judge Ross stated at p. 818:

"* * * it may be said that, while many of the states have statutes to the effect that no one can be legally convicted of a conspiracy on the testimony of a co-conspirator without independent corroborating evidence, there is no such statute of the United States. That the federal courts, in criminal cases, are not governed by state statutes, is well settled. * * *"

In *Jewett v. United States* (9th Cir., 1926), 15 Fed. (2d) 955, the court said:

"* * * that the practice in Federal Courts in criminal cases is not subject to regulation by State law."

The case of *Avila v. United States* (9th Cir., 1935), 76 Fed. (2d) 39, has been occasionally cited as authority for the fact that the court, in fixing the procedure for the exercise of per-

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emptory challenges, is bound by State law. The case is not authority for such a proposition and is only authority that the defendant in a murder case in the Federal Court is entitled to twenty peremptory challenges, and that the allowance of only nineteen constitutes reversible error.

The difficulty with the case arises where the court, at pages 40 and 41, after citing 28 U. S. C. 729, states:

"We have the right, if we are not bound in every case in which there was no express provision of the Federal statute, to apply the provision and laws of the State in which the Court is held."

In so far as this dictum permits the Court in its discretion to follow the State practice in the empaneling and challenging of jurors, the case is in line with the general line of authority; but to the extent that the Court indicates it is bound to follow State practice, the dictum is definitely out of line with current authority.

A further section which has led to some confusion is Section 411, U. S. C., Title 28.¹⁰

In so far as the *qualifications* of trial and grand jurors are concerned, the practice of the State is followed. This is one of the exceptions referred to heretofore. However, Section 411 should be limited in its application entirely to the qualifications of jurors, and not to procedure in empaneling the jurors.

Various cases have cited both Section 411 and 729 U. S. C., Title 28.¹¹ Each of these cases, however, can be justified under Section 411 without reference to Section 729.

With reference to the regulation of the use of peremptory challenges by the District Court, the Supreme Court has held that the Federal court is not bound by State statutes.

¹⁰Sec. 411, U. S. Code, Title 28 (Judicial Code, Sec. 275) reads as follows:

"JURORS: QUALIFICATIONS AND EXEMPTIONS. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

¹¹*Crowley v. United States* (1903), 194 U. S. 461; *United States v. Egan* (1887), 30 Fed. 608; *United States v. Clune* (1894), 62 Fed. 789; *United States v. Mitchell* (1905), 136 Fed. 896.

Pointer v. United States (1894), 151 U. S. 396, is the leading case,¹² and the court said at page 406:

"The objection that the jurors were not selected in the particular mode prescribed by the laws of Arkansas, cannot be sustained."

and at page 407 said:

"There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the *qualifications and exemptions of jurors to serve* in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and empanelling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. *United States v. Shackleford*, 18 How. 588; *United States v. Richardson*, 28 Fed. Rep. 61, 69. In the absence of such a rule or order, (and no such rule or order appears to have been made by the court below,) the mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses." [Emphasis added.]

As to the method to be followed in exercising peremptory challenges, the case of *Lewis v. United States* (1892), 146 U. S. 370, was a case in which the trial court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, and one to be given to the District Attorney and one to the defense counsel. The court directed each side to proceed with the challenges, without knowledge on the part of either as to what challenges were made by the other.

The record did not disclose that at the time the challenges were made, the jury had been called into the box, nor that they or the prisoner were present. The court stated that a fair reading of the record lead to the opposite conclusion, and that a sub-

¹²See also *Radford v. United States* (2nd Cir., 1904), 129 Fed. 49, at 52, 53; *Tierney v. United States* (4th Cir., 1922), 280 Fed. 322, at 324; *Roush v. United States*, 47 Fed. (2d) 444; *Strang v. United States*, 53 Fed. (2d) 820; *St. Clair v. United States*, 154 U. S. 134; (approving the holding in the *Pointer* case, *supra*).

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stantial right of the prisoner was that of being brought face to face with the jurors at the time the challenges were made. Accordingly, the judgment was reversed.

In *Pointer v. United States* (1894), 151 U. S. 396, a similar practice was followed. The defendant and the government were each furnished with a list of thirty-seven jurors. The defendant was allowed twenty challenges and the government five, and the remaining first twelve names, not challenged, were sworn in as the trial jury. Objection was made by the defendant on various grounds, including that the practice did not follow the laws of the State of Arkansas, or the rule practiced by common law courts; that the defendant could not know the particular jurors before whom he would be tried until after his challenges had been exhausted; that the government did not tender to the defendant the jury before whom he was to be tried, but tendered seventeen men instead of twelve.

The court held that the proceeding was proper, and that the evil inherent in the *Lewis Case* (*supra*), was not present.

The court said, at page 409:

" . . . A list of all those found to be qualified under the law, and not subject to challenge for cause, was furnished to the accused and to the government each side being required to make their challenges at the same time, and *having notice from the court that the first twelve unchallenged would constitute the jury for the trial of the case.* It is apparent, from the record, that the persons named in the list so furnished were all brought face to face with the prisoner before he was directed to make, and while he was making, his peremptory challenges.

"Was the prisoner entitled, of right, to have the government make its peremptory challenges first, that he might be informed, before making his challenges, what names had been stricken from the list by the prosecutor? In some jurisdictions it is required by statute that the challenge to the juror shall be made by the State before he is passed to the defendant for rejection or acceptance. Such is the law of Arkansas, and the court below was at liberty to pursue that method. Mansfield's Digest, Sec. 2242. . . . But as no such provision is embodied in any act of Con-

gress, it was not bound by any settled rule of criminal law to pursue the particular method required by the local law. . . ." [Emphasis added.]

The court said, at page 412:

"It is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government. But that circumstance does not change the fact that the accused was at liberty to exclude from the jury all, to the number of twenty, who, for any reason, or without reason, were objectionable to him. No injury was done if the government united with him in excluding particular persons from the jury. He was not entitled, of right, to know, in advance, what jurors would be excluded by the government in the exercise of its right of peremptory challenge. He was only entitled, of right, to strike the names of twenty from the list of impartial jurymen furnished him by the court."

In *Philbrook v. United States* (8th Cir., 1941), 117 Fed. (2d) 632, the appellant challenged the procedure followed by the court in selecting the trial jurors. The court said, at pp. 635-636:

" . . . There is nothing in the Constitution which requires Congress to grant peremptory challenges to the accused, or which limits the courts to any particular method of securing to an accused the right to exercise the peremptory challenges which Congress grants him. Compare *Stilson v. United States*, 250 U. S. 583, 586, 40 S. Ct. 28, 63 L. Ed. 1154. The order in which peremptory challenges must be exercised is within the discretion of the trial court. *Pointer v. United States*, 151 U. S. 396, 410, 14 S. Ct. 410, 38 L. Ed. 208. It can require the Government to exercise its peremptory challenges first; but it is not required to do so. *Pointer v. United States*, *supra*, 151 U. S. page 410, 14 S. Ct. 410, 38 L. Ed. 208. The accused and the Government can be required to make their peremptory challenges at the time any qualified jurymen is presented for challenge or acceptance. (*Pointer v. United States*, *supra*, 151 U. S. page 410, 14 S. Ct. 410, 38 L. Ed. 208); and a rule of court requiring that, if not challenged, a jurymen shall be accepted and sworn, is valid. *St. Clair v. United States*, 154 U. S. 134, 147, 148, 14 S. Ct. 1002, 38 L. Ed. 936. The only limitations upon a court of the United States in impan-

eling a jury is that the system used must not be one that prevents or embarrasses the full, unrestricted exercise by the accused of his right of peremptory challenge, and must not be inconsistent with any settled principle of criminal law, or interfere with the selection of impartial juries. *St. Clair v. United States*, 154 U. S. 134, 148, 14 S. Ct. 1002, 1008, 38 L. Ed. 936.

"The court below was free to follow any method in impaneling a jury which did not impair the free exercise by the defendants of their right of challenge. *Tierney v. United States*, 4 Cir., 280 F. 322, 324, certiorari denied, 259 U. S. 588, 42 S. Ct. 590, 66 L. Ed. 1077. Compare *Avila v. United States*, 9 Cir., 76 F. 2d 39, 42, 43-49." [Emphasis added.]

In *Holmes v. United States* (8th Cir., 1943), 134 Fed. (2d) 125, the court said, at p. 129:

" . . . Nothing in the Constitution requires Congress to grant peremptory challenges to the accused and we have held that courts are not limited to any particular method of exercising peremptory challenges which Congress has granted defendant. *Philbrook v. United States*, 8 Cir., 117 F. 2d 632. See, also, *Wood v. United States*, 299 U. S. 123, 57 S. Ct. 177, 81 L. Ed. 78; *Stilson v. United States*, 250 U. S. 583, 40 S. Ct. 28, 63 L. Ed. 1154." [Emphasis added.]

Peremptory challenges may be made after the acceptance of a juror. *Wilkes v. United States*, 291 Fed. 988, cert. den. 263 U. S. 719; *United States v. Davis*, 103 Fed. 457, aff. 107 Fed. 533.

Peremptory challenges may be made up to the time the jury is sworn to try the case. *Avila v. United States*, 76 Fed. (2d) 39, *supra*; *United States v. Davis*, 103 Fed. 457, aff. 107 Fed. 753.

The accused and the prosecution may be required by the court to make their peremptory challenges at the time any qualified juror is presented for challenge or acceptance. *Pointer v. United States*, 151 U. S. 396, *supra*; *Philbrook v. United States*, 117 Fed. (2d) 632, at 635, *supra*, cert. den. 313 U. S. 577.

CONCLUSIONS

From the foregoing cases, the following rules are apparent:

- (a) The Federal Court is not bound to follow State law practice.

- (b) It may follow such practice, if it desires, in the absence of a rule of court.
- (c) The prescribing of the method of impanelling a petit jury and the use of peremptory challenges is in the discretion of court. The trial court must see that the defendant has a right to question and inspect the jury and *reject*, to the extent of his peremptory challenges, those jurors with whom he is not satisfied.
- (d) The use of lists upon which peremptory challenges shall be made by the Government and the defendant is proper so long as it is done in the manner pointed out in the *Pointer case*, and not done in the absence of the jury as appeared in the *Lewis case*.
- (e) The court may prescribe the time at which the challenges shall be made, either at the time each juror is finally passed for cause or at the time twelve jurors are finally passed for cause.
- (f) The defendant has a right to exercise a peremptory challenge until the jury is finally sworn.
- (g) The court may prescribe the order in which peremptory challenges are exercised, requiring either the government or the defendant to exercise the first challenge.
- (h) The court may require the defendant to exercise several challenges to the government's one, since the defendant has no right to any particular method in the exercise of his challenges.

It is respectfully submitted that the practice formerly used in the District Court for the Southern District of California under the old Rule 51, prior to the repeal of this rule, is a proper and satisfactory method in so far as the order of peremptory challenges is concerned. It required the defendant to exercise two peremptory challenges to the government's one until such time as the challenges were equal, and then required the defendant to exercise one and the government one, until the challenges were exhausted.

This is fair to the defendant and the government, and obviates a situation where the government's challenges are otherwise speedily exhausted and the defendant, with an excess number of remaining challenges, then proceeds to remove four or more jurors from the box by the exercise of his peremptory challenges, leaving the government with no remedy in case a bad juror is seated.

SOME OBSERVATIONS ON THE SETTLEMENT OF TERMINATED COST-PLUS-A-FIXED FEE WAR CONTRACTS

By Phil H. Curry, of the Los Angeles Bar*

I. INTRODUCTION

PROBLEMS of emergent interest to members of the Bar in this area arise out of the settlement of their clients' contract termination claims against the United States Government. It is, of course, common knowledge that Southern California produced a large share of the nation's airframes during the war, but it is not so generally known that 50%, dollarwise, of all the war contracts let by the Army Air Forces were let on a cost-plus-a-fixed-fee (hereinafter abbreviated as "CPFF") basis.

While this article will be confined to a discussion of a few of the particular problems which confront Army Air Forces (hereinafter called the "AAF"), contractors, and subcontractors, it is believed that the general theses discussed are relatively common to CPFF war contracts with all of the contracting agencies of the government.

The basic law governing the termination of all war contracts is the Contract Settlement Act of 1944¹; the basic regulations issued pursuant to that Act are known as Office of Contract Settlement Regulations²; and the basic regulation governing the procedures for the termination of War and Navy Department contracts is the Joint Termination Regulation.³

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¹Public Law No. 395, 78th Congress, effective July 21, 1944. Hereinafter referred to as the "Act."

²Special commendation is due Mr. Robert H. Hinckley, the Director of Contract Settlement, and his extremely able staff for the excellent work evidenced by the Regulations of the Office of Contract Settlement. However, inasmuch as none of these Regulations deal particularly with the problems of CPFF contracts, no further reference is herein made to them.

³First promulgated by the War and Navy Departments in November of 1944. Hereinafter referred to as the "JTR." It may be found in the War Law Service, Government Contract Volumes, of both the Commerce Clearing House and Prentice-Hall Services.

The provisions of the JTR applicable to CPFF contracts are contained in Part 6 of Section V of the JTR at paragraphs 560-569. Unless the practitioner has had an immediate familiarity with the practical aspects of CPFF contracting, however, the contents of those paragraphs probably will only serve to baffle him. It is, therefore, necessary briefly to sketch in a rough outline of those practical aspects in order to understand the problems which arise in connection with the settlement of terminated CPFF war contracts.

II. PRACTICAL ASPECTS OF CPFF WAR CONTRACTING

A. The CPFF Contract Itself

The typical CPFF war contract was a relatively rigid document. In the War Department, at least, its language was largely governed by the War Department "Procurement Regulations".⁴ The contract itself usually provided that the contractor was to produce and deliver to the government, in accordance with a specified delivery schedule, a designated quantity of a particular type of article, plus spare parts therefor equivalent in money value to a stated percentage of the total estimated cost of the articles themselves. For his efforts, the contractor was to be reimbursed for his "allowable costs" and to be paid a certain fixed fee, which was usually, though not necessarily, a given percentage of the total estimated cost.

In addition to the foregoing, the contract also provided that title to all property purchased by the contractor for the performance of the contract vested in the government immediately upon its delivery to the contractor at any place within the continental limits of the United States. It also provided that the contractor was not to be liable for damage to or loss or destruction of such property except in the event of wilful misconduct, or failure to exercise good faith on the part of the contractor's officers or those having supervision or control of the whole of a contractor's plant wherein the contract work was produced. The contract further provided that "accountability" for government-owned property in the possession or control of the contractor should vest in a designated Accountable Property Officer, who

⁴The War Department Procurement Regulations set forth, in addition to other matters, the required and optional provisions to be inserted in War Contracts let by the War Department.

was governed by another regulation informally known as TM 14-910.⁵

Lastly, of course, the contract contained an article entitled "Termination by the Government." This article appears at paragraph 932 of the JTR.

B. Operations Under the Contract

The contractor's costs to which he was entitled to be reimbursed were almost never those actual out-of-pocket dollars and cents which his accountants would historically record as having been spent on the entire contract project; rather, they were those costs determined by the Administrative Contracting Officer (hereinafter, the ACO) to have been incurred on the project, as such costs are defined and delineated in TD #5000⁶ (which was

⁵War Department Technical Manual No. 14-910, entitled "War Department Industrial Property Accounting Manual for Cost-Plus-a-Fixed-Fee Supply Contracts," dated December, 1944. This document can be obtained from the Superintendent of Documents, United States Government Printing Office, Washington, D. C.

⁶Treasury Decision No. 5000, approved by the Secretary of War on August 2, 1940, promulgated by the Treasury Department, in Section 26.9 of Chapter I of Title 26 of Code of Federal Regulations.



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incorporated into the contract by reference), plus whatever additional classifications of allowable costs the contract specifically spelled out.

The ACO, who was only infrequently an accountant by training or experience, was aided in the foregoing determinations by a staff of AAF auditors, whose task it was to audit the costs incurred by the contractor and to recommend to the ACO either the allowance or disallowance of particular items thereof.

There was, however, in practice, an additional test to which the contractor's costs were subject, after such costs had been certified by the contractor, by the AAF auditors, and by the ACO and even after, so certified, such costs had been actually reimbursed to the contractor by the Finance Officer of the contracting agency involved. This test may be succinctly summarized as follows: "Were the costs actually incident to and necessary for the performance of the contract, or were they not?"

The agency which applied this test was the General Accounting Office of the United States,⁷ popularly known as the GAO, whose duty it is to audit the accounts of disbursing officers of the government, and, incidentally, the vouchers against which such officers make their payments.

If the GAO, in auditing the accounts of the Finance Officer who had actually reimbursed the contractor for a particular item of cost, determined that the item was not, for one reason or another, actually incident to and necessary for the performance of the contract, it would issue an informal inquiry. The burden was then placed on the AAF audit staff and the ACO to prove to the satisfaction of the GAO that the item was in fact a proper one for the United States to have paid. If, at the end of 60 days, an unsatisfactory or no answer had been supplied to the GAO, the GAO then issued a formal exception to that item of cost. The exception operated to throw the accounts of the disbursing officer out of balance, with resultant personal liability on him. He, naturally enough, sought to protect himself there-

⁷See the Budget & Accounting Act of 1921, as amended. For an excellent critique of the powers, duties and functions of the General Accounting Office, see Harvey C. Mansfield, *The Comptroller General*, published in 1939 by The Yale University Press.

from by off-setting the amount of the GAO exceptions against other payments due the contractor, either under the same, or a different, war contract.

For this reason, it immediately will be apparent that the fixed fee to which a contractor was entitled upon completion of the work called for under the contract was by no means all clear profit. As a fact, instances have occurred under CPFF contracts which provided for the payment of a fixed fee of but one (\$1.00) dollar wherein the GAO excepted to a particular substantial item of cost, with the notation that the cost was one which the fixed fee was designed to cover.

III. RESPONSIBILITY FOR PROPERTY

At the outset it should be observed that at no time during the war period did the government allow its prime contractors or their major subcontractors to shut down their production operations long enough to take a complete physical inventory of the property in their possession or control. And because of the emphasis on getting the job done and "to hell with the paper-work!" almost all accountable property officers used the contractor's own records—which were admittedly inaccurate—of government-owned property in his possession or control.

Paragraph 104 of TM 14-910 provides for relief of the Accountable Property Officer from accountability for government-owned property at the time of contract termination by means of a physical inventory of such property, a comparison of that physical inventory with the established records thereof to determine existing shortages or damage, and for the written advice of a contracting officer as to the contractor's liability, if any, for the condition of or shortages in such property.

It is submitted that such a procedure—though provided for in the regulations—will prolong indefinitely the settlement of terminated CPFF war contracts. Under existing procedures, almost ninety (90%) percent of all the property in an airframe contractor's possession or control is authorized to be scrapped. It is, therefore, believed that no useful purpose can be achieved by such a physical count and reconciliation of records of property which will ultimately end up on a scrap heap, and that less cum-

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bersome procedures must be devised for affording relief of the contractor from responsibility, and of Accountable Property Officers from accountability, for government-owned property.^{7a}

IV. NEGOTIATED SETTLEMENT OF CPFF CONTRACT TERMINATION CLAIMS

The typical CPFF contract recites that it is made and entered into by ". . . the United States of America (hereinafter called the government), represented by the Contracting Officer executing this contract . . ." Although the government, insofar as its contracts with private persons or firms is concerned, is in legal contemplation an entity, (much as a corporate contractor is an entity) in the course of performing CPFF contracts, contractors have discovered that, though their contracts are so executed, from a practical standpoint, the government is a Hydra: The contract is actually signed by one Contracting Officer; it is administered by another Contracting Officer, the ACO aided by the AAF Audit Staff, whose functions have been dealt with hereinabove; both of the latter are "second-guessed" by the GAO; and the man with whom the contractor must settle his termination claim is still another officer known as the Termination Contracting Officer (hereinafter, the "TCO") who is, incidentally, almost universally an Army officer of the highest calibre.⁸

Because, however, of the processes of auditing which have already been described, ". . . usually a good many matters relating to performance under the contract are unsettled when a cost-plus-a-fixed-fee contract is terminated. War Contractors are reluctant to agree to settle only claims relating to the terminated portion of the contract and to leave other claims for future negotiations, or for litigation in the Court of Claims. An additional reason why partial settlement is unsatisfactory, is that frequently

^{7a}Under the authority of Adjutant General's Letter No. 160 (30 Aug. 1945) OB-S-SPFCL-M, referred to in paragraph 8 of Air Technical Service Command Regulation No. 69-101, dated 15 Oct. 1945, the audit requirements hereinabove discussed have been substantially liberalized.

⁸The writer was privileged to attend the July, 1944, session of the "Readjustment Officers' Training Course," given at Wright Field, Dayton, Ohio. All of the officers and civilian AAF personnel in attendance were men who had had exceptional legal, accounting and business background in civilian life, and who were "drafted" into contract termination work by reason of their ability and backgrounds.

the issues arising in connection with the terminated part of a war contract are so directly related to unsettled issues arising under the part of the contract that has been performed that it would be difficult or impossible to settle the one class of claims without affecting the other."⁹ The Attorney General of the United States has opined that, under the Act, settlements *can* include reimbursed, as well as unreimbursed, costs under a CPFF contract.¹⁰

It therefore appears that contractors will—indeed must—claim, in connection with the settlement of their terminated CPFF contracts, that certain of the costs they have incurred in the performance of such contracts are reimbursable, despite the prior determination by the ACO or the GAO that such costs are not reimbursable, or necessary for or incident to performance, under the contract.

A. Authorization for Final Settlement

(1) The Audit Status Date

The term "audit status date" was inserted in the JTR in Revision No. 1 thereto dated April 20, 1945. It was purportedly designed to enable the contractor and the TCO to know when they might sit around the settlement table and begin to negotiate a settlement of the contractor's termination claim under the particular terminated CPFF contract without fear that further GAO informal inquiries or formal exceptions might be issued against costs which had been incurred by the contractor, certified by the AAF auditors and the ACO and previously reimbursed to the contractor by the Finance Officer.

JTR 563.4 provides for the establishment, by the TCO, of an audit status date, which date must be at least 60 days from the date the GAO receives the notification therein provided for; and JTR 563.5 provides that every effort will be made by the TCO satisfactorily to answer any informal inquiries and formal exceptions issued by the GAO with respect to reimbursed costs up to the audit status date. In addition, provision is made [in JTR 563.5(4)] for a 30-day grace period

⁹Informal Opinion of the Attorney General of the United States, dated October 31, 1944.

¹⁰*Ibid.*

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after expiration of the audit status date in order that a final effort may be made to clear exceptions and outstanding reclaim vouchers.¹¹

Contractors, however, have no assurance whatsoever that the audit of the GAO will be completed within the 60-day audit status period, nor have they any assurance that further formal exceptions will not be issued after that date. In fact, it is extremely doubtful that the GAO's audit which may come anywhere from 60 days to two years or more after the contractor has actually expended his money, can be completed within a 60-day or even a 90-day period. This lag arises out of the fact that, as has heretofore been observed, the GAO audits the accounts of the disbursing officers and the vouchers against which they have paid out government funds. "Vouchers for some items, however, for various reasons require a longer period of time for consideration . . ." ¹² by the AAF auditors. "Indeed, in the case of some existing contracts, final vouchers for certain costs have not yet been submitted for the years 1942 and 1943."¹³

(2) Reimbursed Costs Which Are the Subject of GAO Exceptions

JTR 563.6(2) provides that the TCO may, if the contractor so requests, refer any costs not otherwise authorized for inclusion in the settlement agreement, through channels, to the Under Secretary of War or the Secretary of the Navy for instruction. Contractors, however, have no assurance that such instructions will be forthcoming, nor does the JTR give any indication as to what such instructions may provide. Although nowhere specified in the JTR, it is generally believed that those officials will probably confer with the Comptroller General as to whether the disputed item of cost is or is not reimbursable; conferences, if held, wherein the contractor, who is actually out of pocket because of having incurred such costs, will not be represented.

It must, again, be borne in mind that the CPPF contract itself provides that the allowability of costs shall be determined,

¹¹See JTR 561.3 for a description of the function of "reclaim vouchers."

¹²See note 9, *supra*.

¹³*Ibid.* The costs referred to are, in most instances, costs of an overhead nature. The Opinion, from which the excerpt is quoted, was written over a year ago; it would be interesting to know how great the lag is now, in November of 1945.

not by the GAO, but by the ACO; that these costs had once been determined by his auditors and himself to be allowable and had actually been paid to the contractor by the Finance Officer; and that the GAO had, once before, and contrary to the apparent intention of the contract itself, "second-guessed" the ACO and, by charging the accounts of the Finance Officer, forced the latter to recoup the amount thereof from the contractor.

B. Negotiation as a Compromise

Much has already been written and said as to the power of the contracting agencies to "negotiate" the settlement of terminated war contracts. A satisfactory explanation of that power has yet to appear. It is, however, submitted that in the situations described above, such power can have a very potent meaning; the TCO should be prepared to negotiate such items of cost as to which disputes as to reimbursability exists on the basis of a fair appraisal of the contractor's chances of recovery through the Appeal Board established by the Director of Contract Settlement under the Act,¹⁴ or in the courts, and a fair estimate of the market value thereof. Most war contractors, it is believed, would be more than willing to settle their claims against the government speedily and fairly on such a basis; moreover, it is submitted that the Congress, in Section 1(b) of the Act, has given the contracting agencies, a clear mandate so to do.¹⁵ Furthermore, such a method of negotiation would be comparable to that followed by the Department of Justice and the Treasury Department in the compromise of disputed claims.

V. FINALITY OF SETTLEMENT

The form of Supplemental Settlement Agreement prescribed at JTR 983.1 for use in memorializing the final and conclusive settlement of a CPFF prime contract specifies, in Article 4(a)

¹⁴See Section 13(d) of the Act and Office of Contract Settlement Regulation No. 15.

¹⁵From the Attorney General's Opinion, cited in note 9, *supra*, the following excerpt is taken: "In the Committee reports and throughout the debates it was emphasized that the statute was intended to enable the government to settle disputed matters rapidly and fairly and with finality so that a war contractor would be able to take a new war contract or to reconvert rapidly to peacetime production. . . the purpose of the statute was to permit claims under terminated war contracts to be settled on the same basis as similar claims are settled in ordinary commercial transactions."

thereof, that "... the government as part of this negotiated settlement, hereby confirms and acknowledges the right of the contractor to retain all ... sums heretofore paid and agrees that such sums constitute a portion of the total amount to which the contractor is entitled in complete and final settlement of the contract." Unfortunately, there is no provision in the form for filling in the exact amount that has been paid the contractor by way of reimbursement of allowable costs and payments on account of fixed fee up to the date of execution of such a Supplemental Settlement Agreement.¹⁶

There is no clear specification anywhere in the JTR as to the effect of the disallowance by the ACO at the behest of the AAF auditors or the filing of an exception by the G.A.O. or to an item of overhead costs, for example, part of which is allocable to a contract as to which such a Supplemental Settlement Agreement has been signed by both the contractor and the government.

It is believed, however, that with respect to that portion, at least, of such costs allocable to a terminated CPFF contract as to which such a Supplemental Settlement Agreement has been executed, the contractor is not liable to recoupment¹⁷ nor is the Finance Officer personally liable therefor.¹⁸

VI. CPFF SUBCONTRACTS

All of the problems inherent in the settlement of a terminated CPFF prime contract appear in connection with the settlement of a terminated CPFF subcontract, with the addition of another party—i.e., the CPFF subcontractor.

The settlement of a CPFF subcontract involves at least four chief elements:

A. Approval of Subcontract Settlements

It is obvious that the particular TCO charged with the settlement of the termination of the CPFF subcontract, being on the scene at the subcontractor's plant, is in a far better position to approve the settlements the CPFF subcontractor makes with his fixed price subcontractors than is either the prime contractor or

¹⁶Compare Article 4(a) of the form prescribed for use under fixed-price prime contracts, at JTR 981.1.

¹⁷See Sections 3(m) and 6(c) of the Act.

¹⁸See Section 15(a) of the Act.

the TCO charged with the settlement of the related prime contract, who might be clear across the continent from the subcontractor's plant.

B. The Determination of Costs

The prime contractor, under the usual pattern established by the AAF for the administration of CPFF subcontracts, has been little more than a conduit for the flow of funds from the government to the CPFF subcontractor. All of the auditing and determinations as to allowable costs incurred by the CPFF subcontractor have been done and made at the subcontractor's plant by AAF auditors and by an AAF-ACO who are stationed there. Since the prime contractor has had nothing more to do with the subcontractors' costs than to receive, and to pay against, ordinary commercial invoices certified by the subcontractor and by the AAF auditors and the ACO located at the subcontractor's plant, neither the prime contractor nor the prime contractor's TCO is in a position to make final determination as to the allowability, or otherwise, of the costs incurred by the CPFF subcontractor. In fact, for either of them to do so would be to violate the usual terms of such subcontracts, which typically provide that the ACO located at the subcontractor's plant shall make the determinations as to the allowability of costs.

C. Plant Clearance

Here again the TCO on the scene is far better equipped to approve the disposition of the CPFF subcontractor's contractor and termination inventories, with the aid of the Accountable Property Officer and the Plant Clearance Officer, also on the scene, than is the TCO at the prime contractor's plant.

D. The Adjustment of Fixed Fee

The old so-called standard CPFF termination article¹⁹ provided for the payment, upon termination of such a contract, of the same proportion of the fixed fee as the percentage of completion of the work actually done bore to the total work called for under the contract. It is worth noting here that, although the JTR contains an "Approved termination article

¹⁹Formerly set forth in Procurement Regulation No. 15 at paragraph 903.

for fixed price supply Subcontracts,"²⁰ there is nothing comparable therein relating to CPFF subcontracts. The result of this hiatus in the JTR has been that most of the CPFF subcontracts contain a hybrid version of the old standard CPFF termination article.²¹ The new uniform CPFF termination article,²¹ which has been adapted for use in a few CPFF subcontracts, allows the negotiation of the fee between the parties, but retains the old percentage of completion basis in the formula provisions thereof.²²

It should be obvious that the TCO located on the subcontractor's premises is in a far better position to determine the percentage of completion and, indeed, to negotiate with the subcontractor the amount of fee to which he is entitled than either the prime contractor or the prime contractor's TCO.

The foregoing facts, coupled with the fact that many CPFF subcontractors were subcontractors to two or more prime contractors for the same or similar products, leads inevitably to the conclusion that the government, being in effect the "real party in interest" should undertake to settle such subcontracts directly. That it has not done so to date, as a general practice, has probably been because too few CPFF prime and subcontractors have seen fit to request of the contracting agencies implementation by appropriate regulations, of JTR 569.2(3)(b) and 569.4 which make provision therefor.

VII. CONCLUSION

While in no wise exhaustive, the foregoing observations should serve to apprise the reader of a few of the problems he is likely to face in connection with his clients' war contract termination claims. The reader may, however, be assured of one thing: while there are few, if any, precedents to guide him, there are, on the other hand, few precedents to rule him.²³

²⁰JTR 936.

²¹JTR 932.

²²See JTR 932, at paragraph (c).

²³See, for example, Historical Study No. 57, "Termination of Ordinance Contracts, 1918," by J. Donald Edwards, issued in January, 1943, by the Bureau of Labor Statistics of the United States Department of Labor.

RETROSPECT ON COST-PLUS

By Norman Macbeth, of the Los Angeles Bar*

DURING the recent war there was much criticism of the cost-plus-a-fixed fee (CPFF) system of contracting. The usual objection was that there was no premium on thrift, hence contractors hoarded labor, wasted material, and generally let their costs run up. The system was so maligned that the Army tried hard to switch all outstanding contracts to fixed-price.

Perhaps the Los Angeles area saw a heavier use of CPFF than any other part of the country, mainly because our aircraft manufacturers needed the current reimbursement and apparent relief from risk which it afforded. The system was little loved by those involved in it, but experience disproved the above objection, showing the CPFF contractors to be as prudent as others in their expenditures. The true disadvantages were more or less as follows:

1. **Too Much Auditing.** In the early days the contractors had a happy belief that they would be pretty much on the honor system. They were soon disillusioned. Though made by and in the name of a contractor, disbursements came from government funds. Therefore the government agencies felt that an audit was in order and proceeded accordingly. As many as 150 Army auditors were stationed at the plant of a single large manufacturer. These men were audited in turn by a sizable staff from the General Accounting Office. Very few trained industrial accountants could be hired during the war, hence the quality of these staffs was not high. No one who watched all this activity has been heard to say that it facilitated the war effort.

2. **Procurement Disrupted.** One reason why the accusation of extravagance is groundless is that the government agencies, especially the Army, made a point of supervising the work of the contractors' purchasing agents. Many CPFF contractors issued purchase orders only after securing

*Throughout the War Mr. Macbeth was a member of the legal staff of Douglas Aircraft Company, Inc. In January, 1946, he will re-enter private practice as a member of the firm of Macbeth & Perelli-Minetti.—Ed.

the written approval of government representatives. This supervision made for close buying and kept the purchasing agents alert, but it also produced serious irritations. Contractors were often not allowed to buy from suppliers whom they knew and trusted if these suppliers were not low on price. It was extremely difficult for a contractor to show mercy to a man who had made a ruinously low bid, even though good business judgment would dictate some relief; the Army might approve a correction, but the General Accounting Office believed strongly that suppliers should be held to the letter of their commitments. Many CPFF contractors fear that their vendor-relations have been permanently impaired by their following instructions which, although entirely legal, ignored the realities of the problems of procurement in wartime.

3. **Initiative Crippled.** CPFF contractors soon realized that they were acting at their peril. If their expenditures were disapproved *ex post facto* by the contracting agency or by the General Accounting Office, reimbursement would be denied. Hence

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they ceased to act without prior approval. This in turn placed a heavy responsibility on Contracting Officers who were compelled to pass on the most intricate legal, fiscal, and technical problems, with no assurance that they would be sustained by their supervisors and by the General Accounting Office (which never gives prior approval without a lengthy referral to Washington). The result was a general timidity which ill suited the need for a resolute action.

4. **General Confusion.** The CPFF system requires a reorientation of ideas which many persons never accomplish. There are still those who cannot distinguish it from the outlawed cost-plus-a-percent-age-of-cost system.¹ But even for the initiated many questions remain unsolved, one of the most delicate of which is the title to goods purchased by the contractors. The general principle that the government should own what it pays for produces surprising results; *e.g.*, the Army sets out to buy airplanes and finds that it has also acquired policemen's jackets, lawn-mowers, and all the stores and equipment of a factory. If we take the case of law-books purchased by a CPFF contractor for the use of its attorneys, we find that the title to such books may be in either the contractor or the government, depending on whether the plant involved was an old one owned by the contractor or a new one specially constructed by the government; whether the contractor set up the books as a capital asset subject to depreciation or charged them off as a current expense; or whether they were loose-leaf or permanently bound. These questions do not hamper production, but they may cause a certain amount of embarrassment or litigation.

It may be suggested that when the government is obligated to reimburse costs, a vast amount of litigation is bound to arise from the absence of a precise definition of costs² Fortunately, however, no flood of suits has yet occurred. The main reason for this is the fact that high taxes have largely removed the pecuniary advantage which usually leads contractors to court. Secondly, the federal rule against splitting causes of action arising under one contract³ deters con-

¹For a gross example, see the famous anecdote of the dinner checks at page 6 of "Harper's Magazine" for June, 1944 (Vol. 189).

²Most CPFF contracts stipulate that costs shall be determined in accordance with T. D. 5000, which is phrased in very general terms.

³*McShain Company, Inc. v. United States*, 87 Ct. Cla. 601 (1938).

tractors from suing until they have completed their contracts and wound up their accounts, which takes an incredible length of time because of disputes over the allocation of overhead.⁴

There may, of course, be a number of suits when the issues on overhead are defined, but it is doubtful that many of these will be adjudicated by the courts. Special tribunals, notably the War Department Board of Contract Appeals, have been established to handle disputes arising out of war contracts. The record⁵ shows these tribunals to be open-minded and intelligent, although their product may not be of the highest judicial order. Furthermore, their justice is quick and cheap, hence CPFF contractors are more apt to resort to them than to the Court of Claims.

In conclusion, it seems safe to predict that, although the reproach of extravagance will not hold water, there will probably be very few CPFF contracts in future wars, except perhaps for experimental contracts. The use of renegotiation in the later years of this war shows that profiteering can be prevented on fixed-price contracts. This has led to the covert but effective practice of contracting at prices so high that the contractor has no risk, then recapturing an amount which hindsight shows to be equitable. If renegotiation can survive constitutional tests, this method should make CPFF obsolete.

AND/OR

... "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning.—EMPLOYERS' MUT. LIABILITY INS. CO. V. TOLLEFSEN, 219 Wis. 434, 263 N.W. 376.

⁴Many CPFF contractors have not yet been able to settle their overhead accounts for 1941. The intricate problems of overhead allocation have led to a new variety of contract wherein the contractor is paid a fixed amount of overhead for every "direct labor hour." This eliminates the most difficult auditing problems, but approaches the time-and-material system which has generally been frowned on.

⁵Most of the decisions are printed in the series known as Contract Cases Federal.

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